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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 164

AYAKO HONDA, ET AL., PETITIONERS

v.

RAMSEY CLARK, ACTING ATTORNEY GENERAL OF THE UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT

OPINION BELOW

The opinion of the court of appeals (R. 69) is reported *sub nom. Kondo* v. *Katzenbach* at 356 F. 2d 351. The district court rendered no opinion.

JURISDICTION

The judgment of the court of appeals was entered on January 13, 1966 (R. 100), and a motion for rehearing *en banc* denied on February 24, 1966 (R. 101). The petition for a writ of certiorari was filed on May 23, 1966, and granted on October 24, 1966 (R. 102; 385 U.S. 917). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Petitioners brought suit to review the Attorney General's denial of their debt claims under Section 34 of the Trading with the Enemy Act. The suit was commenced two and one-half years after the applicable statute of limitations had expired. The questions presented are:

1. Whether the court of appeals correctly held that the record did not support petitioners' claim that the government, by its conduct, should be estopped to plead the statute of limitations as a defense.

2. If the court of appeals erred in this regard, whether the government can be estopped to raise a statute of limitation defense in a suit under Section 34 of the Trading with the Enemy Act.

3. Whether petitioners' Fifth Amendment rights were infringed by the government's successful assertion of the statute of limitations defense.

STATUTE INVOLVED

Section 34 of the Trading with the Enemy Act, 50 U.S.C. App. 34, provides in pertinent part:

Section 34(a):

> Any property or interest vested in or transferred to the Alien Property Custodian (other than any property or interest acquired by the United States prior to December 18, 1941), or the net proceeds thereof, shall be equitably applied by the Custodian in accordance with the provisions of this section to the payment of debts owed by the person who owned such

property or interest immediately prior to its vesting in or transfer to the Alien Property Custodian. No debt claim shall be allowed under this section if it was not due and owing at the time of such vesting or transfer * * *.

* * * * *

Section 34(d):

Payment of debt claims shall be made only out of such money included in, or received as net proceeds from the sale, use, or other disposition of, any property or interest owned by the debtor immediately prior to its vesting in or transfer to the Alien Property Custodian, as shall remain after deduction of (1) the amount of the expenses of the Office of Alien Property Custodian * * * paid by the Custodian in respect of such property or interest or proceeds, and (2) such amount, if any, as the Custodian may establish as a cash reserve for the future payment of such expenses and taxes. If the money available hereunder for the payment of debt claims against the debtor is insufficient for the satisfaction of all claims allowed by the Custodian, ratable payments shall be made in accordance with subsection (g) hereof to the extent permitted by the money available and additional payments shall be made whenever the Custodian shall determine that substantial further money has become available, through liquidation of any such property or interest or otherwise. * * *

* * * * *

Section 34(f):

If the aggregate of debt claims filed as prescribed exceeds the money from which, in ac-

cordance with subsection (d) hereof, payment may be made, the Custodian shall prepare, and serve by registered mail on all claimants a schedule of all debt claims allowed and the proposed payment to each claimant. In preparing such schedule, the Custodian shall assign priorities in accordance with the provisions of subsection (g) hereof. Within sixty days after the date of mailing of such schedule, any claimant considering himself aggrieved may file in the United States District Court for the District of Columbia a complaint for review of such schedule, naming the Custodian as defendant. A copy of such complaint shall be served upon the Custodian and on each claimant named in the schedule. * * * The court shall enter judgment affirming or modifying the schedule as prepared by the Custodian and directing payment, if any be found due, pursuant to the schedule as affirmed or modified and to the extent of the money from which, in accordance with subsection (d) hereof, payment may be made. Pending the decision of the court on such complaint for review, and pending final determination of any appeal from such decision, payment may be made only to an extent, if any, consistent with the contentions of all claimants for review.

* * * * *

Section 34(i):

The sole relief and remedy available to any person seeking satisfaction of a debt claim out of any property or interest which shall have been vested in or transferred to the Alien Property Custodian (other than any property or interest acquired by the United States prior to

December 18, 1941), or the proceeds thereof, shall be the relief and remedy provided in this section, and suits for the satisfaction of debt claims shall not be instituted, prosecuted, or further maintained except in conformity with this section * * *.

STATEMENT

A. BACKGROUND

On December 7, 1941, petitioners had money on deposit with the Yokohama Specie Bank, Ltd., a Japanese banking corporation with offices in California. In exchange for the deposits, petitioners had accepted the Yokohama Specie Bank's non-negotiable certificates of deposit. Those certificates—which expressed their value solely in Japanese currency (*yen*)—bore the following legend in Japanese and in English translation:

> This is to certify that the sum of yen [amount] has been submitted to our Head Office, Yokohama, to be placed in Fixed Deposit there in your name at—percent. per annum for — months, maturing —, subject to the conditions on the back hereof.
>
> Both principal and interest are payable, when due, at our aforesaid Head Office, Yokohama, upon surrender of this Certificate, properly endorsed and/or sealed.

On December 7 the United States seized the assets of the Yokohama Specie Bank situated in the United States as enemy property pursuant to the Trading with the Enemy Act, 50 U.S.C. App. 1 *et seq.* The Superintendent of Banks of the State of California

was appointed conservator and instructed to liquidate the seized assets and to pay creditors of the Bank.[1] He declined to honor the Bank's *yen* certificates of deposit for payment in dollars on the ground that these obligations—as they stated on their face—were payable only in *yen* in Japan.

On April 23, 1943, the Alien Property Custodian[2] formally vested in himself the assets of the bank remaining after liquidation but he neither vested, nor otherwise attempted to extinguish, the Yokohama Specie Bank obligations represented by the *yen* certificates of deposit. After the war, those certificates of deposit were recognized as valid and collectible at face value in *yen* from the Liquidator of the Yokohama Specie Bank in Tokyo, Japan, or from that bank's successor, the Bank of Tokyo, Ltd. (R. 7). In the intervening years, the dollar value of the Japanese *yen* had declined greatly. The pre-war exchange rate had been slightly more than four *yen* to the dollar; the post-war rate was 361.55 *yen* to the dollar (R. 2).

B. THE "DEBT CLAIM" PROVISIONS OF THE TRADING WITH THE ENEMY ACT

Following the close of hostilities in the Second World War, Congress added Section 34 to the Trading

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[1] The circumstances of the government's acquisition of the local assets of the Yokohama Specie Bank, Ltd., are detailed in *Paramount Pictures, Inc.* v. *Sparling, et al.*, 93 Cal. App. 2d 768, 209 P. 2d 968, certiorari denied *sub nom. McGrath* v. *Paramount Pictures*, 339 U.S. 953.

[2] By Executive Order No. 9788, October 14, 1946, 11 F.R. 11981, the powers and duties of the Custodian were transferred to the Attorney General.

with the Enemy Act[3] in order "[t]o provide machinery for paying claims of creditors against the former owners of vested properties on an equitable basis to the extent that the assets vested from each debtor permit." S. Rep. No. 1839, 79th Cong., 2d Sess., p. 2. (Claims of this character are called "debt claims" to distinguish them from the claims of persons asserting title to specific items of vested property directly—"title claims").

Section 34(a) forbade the Custodian to pay debt claims not in existence when or immediately before the debtor's property was vested in or transferred to the Custodian, and reserved to the Custodian any defense to payment which would have been available to the debtor. Section 34(b) required all debt claims to be filed with the Custodian within two years of the enactment of Section 34 or the vesting or transfer of the debtor's property to the Custodian, whichever occurred later. Section 34(c) required the Custodian to pass on each claim individually. Section 34(d) limited the payment of debt claims to the net proceeds of the vested property after the deduction of expenses and taxes. Section 34(g) directed that certain types of claims be given priority for payment (*e.g.*, wages and salary claims for less than $600.00, certain claims of the United States, etc.).

Different procedures for the consideration of debt claims by the Custodian were provided depending upon whether the vested assets in his hands were sufficient to pay all the claims filed against them. If the

[3] Act of August 8, 1946, c. 878, § 1, 60 Stat. 925, as amended. 50 U.S.C. App. 34.

former, Section 34(e) governed. It authorized the Custodian to pay each individual claim as he acted upon it. A claimant dissatisfied with the Custodian's decision could then file a complaint for judicial review in the United States District Court for the District of Columbia "[w]ithin sixty days after the date of mailing of the Custodian's determination."

Where the vested assets were not sufficient to cover all of the debt claims filed against them—and it is with such an "insolvency" situation that this case is concerned—the following procedure was prescribed: Section 34(f) required the Custodian to pass first on the validity of all of the debt claims filed before making any payments. Then, after making due allowance for payment in full of claims entitled to priority under Section 34(g), the Custodian was required to "prepare and serve by registered mail on all claimants a schedule of all debt claims allowed and the proposed payment to each claimant." Dissatisfied claimants were authorized to seek judicial review in the United States District Court for the District of Columbia "[w]ithin sixty days after the date of mailing of such schedule." Pending decision of any such suits, the Custodian could not pay any other claim (even one not challenged) if payment might jeopardize the full recovery of the claims in litigation. Congress added in Section 34(i):

> The sole relief and remedy available to any person seeking satisfaction of a debt claim out of any property or interest which shall have been vested in or transferred to the Alien Property Custodian * * * or the proceeds

thereof, shall be the relief and remedy provided in this section, and suits for the satisfaction of debt claims shall not be instituted, prosecuted, or further maintained except in conformity with this section * * *.

C. THE CLAIMS AGAINST THE YOKOHAMA SPECIE BANK

The six named petitioners, together with more than nine thousand others, filed debt claims with the Custodian against the vested assets of the Yokohama Specie Bank alone. Nearly seven thousand of those claims were, like petitioners', based on the bank's *yen* certificates of deposit.[4]

The named petitioners have been represented by counsel of their own selection in this matter since 1955 (see App., *infra*, pp. 41–42).

Because the aggregate value of the thousands of debt claims filed exceeded the total vested assets of the Yokohama Specie Bank available to pay them, the Custodian proceeded to process those claims under Section 34(f). With regard to the *yen* certificates of deposit, a principal question to be resolved was whether claims based on those certificates should be paid at the pre-war or post-war *yen*-dollar exchange rate. After extensive hearings (which also concerned thousands of similar debt claims against the vested assets of the Sumitomo Bank), the Attorney General (see p. 6, n. 2, *supra*) in 1957 took the position adopted

[4] Petitioner Ayako Honda claimed 3,289 *yen*, Kanekicki Murakami 6,520 (R. 25), Kaneyo Sato 3,138, Tomi Tsugi 655.14, Gensuki Yoshida 5,000—all plus interest from date of deposit. With respect to the special situation of the sixth petitioner, Mrs. Masae Kondo, see p. 16, n. 11, *infra*.

by the banks in Japan and the California Superintendent of Banks—that the certificates of deposit represented obligations payable in *yen* in Japan. As obligations payable in a foreign currency in a foreign country, the "Judgment Day" rule laid down by this Court is *Deutsche Bank* v. *Humphrey*, 272 U.S. 517, and *Zimmermann* v. *Sutherland*, 274 U.S. 253, would be applicable to determine their dollar value. Accordingly, the Attorney General converted the *yen* obligations into dollars at the rate of exchange prevailing on the date of the administrative allowance of the claim. See *Reissner* v. *Rogers*, 276 F. 2d 506, 511 (C.A.D.C.), certiorari denied, 364 U.S. 816. Thus, he concluded, all *yen* deposit claims should be paid at the post-war exchange rate of 361.55 *yen* to the dollar.

In 1958 and 1959, the Attorney General sent letters to all claimants notifying them of his ruling and the reasons therefor, and specifying the amount of each claim he proposed to allow.[5] To facilitate preparation of the final "schedule" of payments required by Section 34(f), the letters included a request that the claimant submit his original certificate of deposit. In the event those certificates were unavailable, a notarized explanation that they had not been paid would suffice. If the certificates or statements were not submitted within the period prescribed in the letter, the claimant was further advised that, under the general rules governing alien property claims, his claim

[5] The complete text of that notice, which was received by petitioners and by their counsel as well (R. 9, 32), is set forth at R. 6 and 29. The delay in sending the notice reflects the fact that there were more than 43,000 debt claims to process. Ann. Rep. of Atty. Gen., 1953, p. 164.

would be considered abandoned and therefore dismissed.[6]

The letter further advised that payment of *yen* deposit claims was also available in Japan at the same exchange rate allowed by the Attorney General. Any claimant desiring to use that source for immediate payment was requested to withdraw the claim he had filed with the Custodian by returning to him an enclosed "Notice of Cancellation of Claim" card. Finally, the letter specifically informed each claimant of his right to file with the Custodian "your objections to the allowance of the claim in the amount stated" and his additional right to judicial review of that determination under Section 34 of the Trading with the Enemy Act, stating (R. 7):

> Within sixty days after the issuance of the [final] schedule, any aggrieved claimant may file in the District Court of the United States for the District of Columbia a complaint for review of such schedule, naming the Attorney General as defendant.

All the named petitioners and their counsel received this letter (R. 7, 9). Petitioners Honda, Murakami and Tsugi, although represented by counsel, submitted neither certificates of deposit nor nota-

[6] Those rules (promulgated under Section 35 of the Trading with the Enemy Act, 50 U.S.C. App. 35) provided: "A claim shall be deemed abandoned when after request to do so the claimant has not furnished relevant information in support of his claim, or where by virtue of his failure to respond to inquiries regarding the claim it appears that he does not wish to pursue it further." 8 C.F.R. § 502.25(g) (Jan. 1, 1957, Rev.), 21 F.R. 1582. The rule remains unchanged. See 8 C.F.R. § 502.25(g) (1966 Rev.).

rized statements in lieu of those certificates. Nor did they file any objections to the Attorney General's ruling on their claims, as his letter invited them to do. He, therefore, notified these three petitioners (no later than September 1959) that he was dismissing their claims as abandoned, reminding them once again, however, that "further proceedings are governed by section 34(f) of the Trading With the Enemy Act" (R. 33). Copies of this letter were sent to petitioners' counsel (App., *infra*, p. 43).

Petitioners Gensuke Yoshida and Kaneyo Sato (also represented by counsel (p. 9, *supra*)), responded to the letters by signing and mailing back to the Office of Alien Property the "Notice of Cancellation of Claim" cards which had been enclosed with the Custodian's letter, thereby withdrawing their claims (App., *infra*, pp. 44–45). Mr. Sato's withdrawal card was mailed to the Attorney General the same day as the Attorney General's letter notifying him and his counsel that his debt claim had been dismissed as abandoned and that further proceedings would be governed by Section 34(f).

In May 1961 the Attorney General prepared the final "schedule" of all debt claims allowed against the assets of the Yokohama Specie Bank, Ltd., and his proposed payments to each claimant. As required by Section 34(f) of the Act, copies of that schedule were sent (between August 22, 1961, and October 19, 1961) by registered mail to all claimants who had not withdrawn their claims (R. 35). Accompanying each copy was a letter advising the recipient (R. 34): "If your claim is not shown on the Schedule, it is for the

reason that the claim had been dismissed and disallowed by this Office." Petitioners' names were not on the schedule. In that letter the Attorney General again called the claimants' attention to their right to have the Attorney General's decision reviewed judicially:

> This Schedule is being served by registered mail on claimants listed therein, as well as on claimants whose claims have been dismissed and disallowed. Pursuant to Section 34(f) of the Trading with the Enemy Act, as amended, any claimant considering himself aggrieved by this Final Schedule may, within sixty (60) days from the date of the mailing of the Schedule, file in the United States District Court for the District of Columbia a complaint for review of this Schedule, naming the Attorney General as defendant. * * * [R. 34.]

However, none of the petitioners filed suit within the time limit fixed by the Act and described in the letters.

D. THE *ABE* AND *ARATANI* LITIGATION

Other claimants did bring suit to challenge the Attorney General's decision on their debt claims. A timely complaint was filed under Section 34(f) on behalf of the more than eighteen hundred Yokohama Specie Bank claimants who had submitted their certificates of deposit to the Custodian and whose claims were allowed on the final schedule at only the postwar *yen* rate of exchange. *Abe* v. *Kennedy* (C.A. No. 2529-61, D.D.C.).[7]

[7] Petitioners in the present case, it is conceded, "were not included among the class on whose behalf said suit was filed" (R. 3).

The *Abe* complaint asserted that the claims should have been allowed by the Custodian at the pre-war *yen* exchange rate. Proceedings in *Abe* were held in abeyance to await the outcome of *Aratani* v. *Kennedy* (C.A. No. 3164–58, D.D.C.), which presented the identical issue.[8] On July 7, 1961, the district court rendered judgment in favor of the Attorney General in *Aratani*. The court of appeals affirmed. 317 F. 2d 161 (C.A.D.C.). On October 21, 1963, this Court granted certiorari. 375 U.S. 877. While the case was pending in this Court, the plaintiffs in both *Abe* and *Aratani* entered into a compromise settlement with the government. The settlement was approved by the district court on March 18, 1964 (228 F. Supp. 706), and the writ of certiorari was then dismissed (380 U.S. 938). The compromise gave the Yokohama Specie Bank claimants in *Abe* approximately half of the amounts sought in their complaint, together with an award for attorney's fees.[9] Not being parties to the *Abe* litigation (n. 7, *supra*), petitioners in the present case were not included in the settlement.

E. THE PRESENT ACTION

After the compromise settlement in *Abe*, the present petitioners asked for similar treatment of their claims. Being of the view that those claims were barred by the

[8] That case had been instituted by persons whose similar debt claims against the vested assets of the Sumitomo Bank, Ltd., had also been allowed by the Attorney General only at the post-war *yen* exchange rate.

[9] The Sumitomo claimants—the plaintiffs in *Aratani*—did not fare so well. Because their claims far exceeded the vested assets available to pay them, they received only 25 percent of their claims. See 228 F. Supp. at 708; 50 U.S.C. App. 34(d).

limitation period prescribed in Section 34(f), and that, by Section 39 of the Act, Congress had intended all moneys remaining in vested alien property accounts to be transferred to the War Claims Fund,[10] the Attorney General rejected petitioners' demand. Petitioners then commenced the present action in the United States District Court for the District of Columbia in May 1964 (two and one-half years after the period for seeking judicial review of the Attorney General's determination had expired) (R. 1). They claimed to be suing "on their own behalf and on behalf of all others similarly situated"—to wit, holders of *yen* certificates of deposit of the Yokohama Specie Bank whose claims had been dismissed as abandoned (R. 1, 3) and who had not filed suit within sixty days as required by Section 34(f)—although, in fact, two of the named petitioners had formally withdrawn their claims (App., *infra*, pp. 44–45). On March 31, 1965, the district court granted the Attorney General's motion to dismiss the actions "because * * * not commenced within the time set forth in Section 34(f) of the Trading with the Enemy Act" (R. 36). The court of appeals affirmed, one judge dissenting (R. 69, 89).

As they had in the district court, petitioners urged on appeal that the government was estopped to assert the statute of limitations defense. The court of ap-

[10] The War Claims Fund is the source from which the Foreign Claims Settlement Commission pays the claims of United States citizens who suffered loss or damage by reason by German or Japanese military operations in World War II. See 50 U.S.C. App. 2011–2012a.

peals expressed doubt that the doctrine of equitable estoppel applies to the United States so as to waive the express time limitation in the Trading with the Enemy Act, but found it unnecessary to decide that question. Noting that the Attorney General had taken "meticulous" and "painstaking" care to inform petitioners of his adverse actions on their debt claims, as well as of the avenue of judicial relief open to them (R. 77), the court concluded (R. 79):

> We do not believe that the factual record before us permits a conclusion that the appellee "by his representations or his conduct induced" the appellants to give appellee any advantage. This being so, the question of whether the doctrine of estoppel restated in *Glus* [*Glus* v. *Brooklyn Eastern Terminal*, 359 U.S. 231] is operative against the Government, or more specifically against this appellee, does not enter this case.

An application for rehearing *en banc* was denied, one judge again dissenting (R. 101–102).[11]

[11] In the same opinion, the court of appeals also affirmed the district court's dismissal of an action brought by Masaru Okamoto and others (No. 19,283, C.A.D.C.) whose claims had been disallowed by the Custodian on the ground that they were ineligible under Section 34(a) of the Trading with the Enemy Act because they had been interned as enemy aliens. 50 U.S.C. App. 34(a). Appellants in that case did not join in the petition for certiorari and are not before this Court.

We note here the special situation of one of the six claimants named in the petition for certiorari in this case, Mrs. Masae Kondo (R. 41). Unlike the other five petitioners, Mrs. Kondo did not receive the 1959 letter from the Attorney General which requested submission of the original certificates of deposit and

SUMMARY OF ARGUMENT

This alien-property suit was dismissed below as untimely, having been filed two and one-half years after the expiration of the period of limitations prescribed by the Trading with the Enemy Act for judicial review of the Attorney General's disallowance of petitioners' claims. Petitioners argue that the government, by its conduct, is estopped to plead the statute of limitations as a defense. The court of appeals held this contention to be factually unsupported, and consequently had no occasion to reach the broader question whether the principle of equitable estoppel is applicable at all in proceedings of this kind against

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advised that otherwise the claim would be considered abandoned. That letter had inadvertently been misaddressed by the Alien Property Office. The "Final Schedule" and accompanying letter advising that her claim had been disallowed and of her right to seek judicial review within sixty days were correctly sent by registered mail to the address Mrs. Kondo had designated. Although those papers were not returned by the Post Office as undeliverable, Mrs. Kondo informs us that in fact she did not receive that notice either, apparently because in the interim she had moved without informing the Alien Property Office of her change of address. Mrs. Kondo states that, had she received any notice, she would have submitted her certificates to the Custodian and timely prosecuted her claim, just as she had done with her similar debt claim against the vested assets of another Japanese Bank (R. 50–51). It seems apparent that, but for the unfortunate confusion as to Mrs. Kondo's correct mailing address, she would have been included in the *Abe* settlement. As we noted in our brief in opposition to the petition for certiorari (p. 12, n. 5), the Attorney General has accordingly advised counsel for Mrs. Kondo that he stands ready to make payment to her on the basis of the *Abe* settlement, as she seeks in her complaint (R. 43).

the government. On either ground, we submit that the judgment below should be affirmed.

I

The facts do not show inequitable or unconscionable conduct on the part of the government. As promptly as was feasible in the circumstances, the Attorney General advised petitioners of the amount of their claims that he would allow. He notified them—repeatedly—of their right to obtain judicial review if dissatisfied with his determination. All of the named petitioners were represented by counsel to whom the notices were also sent. Petitioners inexplicably did not sue. Other claimants similarly situated did sue and, after extended litigation, obtained a compromise settlement that was more favorable to them than the Attorney General's original determination had been. It was then that the present petitioners belatedly brought suit. The foregoing, we shall show, constitute the totality of relevant circumstances—and they are far removed from any that have ever been thought to give rise to an estoppel.

II

Even if the circumstances were such as to warrant invocation of the doctrine of equitable estoppel in a private suit, we believe that the doctrine has no application to suits against the government under the Trading with the Enemy Act. Since the statute of limitations in a suit against the government is jurisdictional, it may not be waived by government officials unless Congress so authorizes. The Trading with the Enemy Act contains no such authorization. All indi-

cations, indeed, are that Congress did not intend that the period of limitations provided in the Act might be extended in the manner petitioners suggest.

III

Finally, there is, in our view, no merit to the contention that enforcement of the 60-day statute of limitations in the circumstances of this case would violate the Fifth Amendment's guarantee against confiscation. First, petitioners had no property rights that were extinguished; they were merely creditors of the bank whose assets were seized. Secondly, the 60-day period—a normal limitation for suits, like the present one, to upset an administrative determination—provided adequate opportunity for petitioners to protect their legal rights.

ARGUMENT

Petitioners were required by Section 34(f) of the Trading with the Enemy Act, 50 U.S.C. App. 34(f), to file any suit for the satisfaction of their debt claims within 60 days of the Attorney General's final determination. That determination was made—no later than October 1961—when he mailed the final notice of debt claims allowed together with the schedule of proposed payments to the Yokohama Specie Bank claimants (R. 35). The time for suit thus expired no later than December 1961. Petitioners did not sue, however, until May 19, 1964—two and one-half years later (R. 1). The issue is whether the suit was properly dismissed as time-barred.

I

THERE IS NO FACTUAL BASIS FOR THE ARGUMENT THAT THE GOVERNMENT, BY ITS CONDUCT, SHOULD IN EQUITY AND GOOD CONSCIENCE BE ESTOPPED TO PLEAD THE STATUTE OF LIMITATIONS IN DEFENSE TO PETITIONERS' SUIT

In *Glus* v. *Brooklyn Eastern Terminal*, 359 U.S. 231, 234, Mr. Justice Black, speaking for the Court, described the doctrine of "equitable estoppel" as follows:

> The principle is that where one party has by his representations or his conduct induced the other party to a transaction to give him an advantage which it would be against equity and good conscience for him to assert, he would not in a court of justice be permitted to avail himself of that advantage. * * *

We believe that the doctrine is inapplicable to suits against the United States (Point II, *infra*, p. 29). However, this Court need not, in our view, reach that question here. As held by the court of appeals, the claim of estoppel is unsupported by the record (R. 79).

A. Petitioners' argument that the circumstances give rise to an estoppel may be broken down into several distinct assertions: (1) that they were discouraged from timely prosecution of their claims by the Attorney General's adoption of the post-war *yen*-dollar exchange ratio; (2) that they were entitled to the benefit of the settlement negotiated by those claimants who did sue; (3) that the government represented to them that they would be treated as well as

claimants who sought judicial review; (4) that they were not clearly apprised of their right to seek such review; (5) that what notice they did receive was additionally inadequate because of language difficulties stemming from petitioners' foreign background; and (6) that pursuit of their judicial remedies was improperly deterred by the Attorney General's request that claimants submit their original certificates of deposit (or, in lieu thereof, a notarized explanation). None of these points, we submit, is meritorious on this record.

1. The Attorney General's decision to pay the debt claims on the basis of the post-war exchange ratio was made in good faith. As to this, we believe there is no dispute. The decision had a substantial basis in law—as attested by its acceptance by the district court and the court of appeals in the *Aratani* litigation (see Statement, *supra,* pp. 13–14). There is no evidence whatever that it was intended to discourage timely suit by disappointed claimants. One might indeed have anticipated the opposite result—that the size of the award would act as a spur to litigation aimed at upsetting it. Many claimants similarly situated to these petitioners did, of course, bring timely suit.

It is not as if the Attorney General's decision was communicated to the claimants on a "take it or leave it" basis without clear indication that they could, if dissatisfied, seek judicial redress. As we demonstrate *infra,* pp. 24–26, petitioners and their counsel were repeatedly and adequately apprised that they

could obtain judicial review of the Attorney General's determination.

2. Petitioners were not entitled to the benefit of the settlement reached—years after they had apparently abandoned their claims—with the claimants who did sue. No principle requires the government, upon concluding a compromise settlement with one litigant or group of litigants, to offer the same settlement to persons with similar claims who failed to prosecute them. Not only would the settlement of lawsuits be deterred by such a theory—under which the act of settlement revives claims that have become time-barred—but it erroneously equates the equities of one who does press his claim in litigation with one who does not. An individual who assumes the cost and burden of litigation is not, we submit, unfairly advantaged because, as the result of his efforts, he obtains a better settlement than an individual who declines to pursue his legal remedies.[12] And we stress that the settlement with the *Abe* and *Aratani* plaintiffs (which occurred after this Court granted certiorari in *Aratani*) was a genuine compromise motivated by uncertainty as to the outcome of the litigation. The Attorney General (who had prevailed in both courts below) did not repudiate his legal position that payment at the post-war rate was required under the decisions of this Court and the claimants did not insist upon payment in the full amount that they had prayed for in their complaints.

[12] See *Sunal* v. *Large*, 332 U.S. 174; *Ackermann* v. *United States*, 340 U.S. 193; *Annat* v. *Beard*, 277 F. 2d 554 (C.A. 5), certiorari denied, 364 U.S. 908.

3. No representation was made or implied that debt claimants who did not seek judicial review of the Attorney General's determination within the 60-day period allowed by Section 34(f) would be treated the same as those who diligently pursued their claims. In 1958 and 1959—before the statute of limitations even began to run—the Attorney General informed all debt claimants with claims based on *yen* deposit certificates of his decision to honor such claims at the lower post-war exchange rate (R. 6). He explicitly advised petitioners and their counsel (R. 7, 9):

> Under the procedures set forth in section 34(f) of the Trading with the Enemy Act, as amended (50 U.S.C. App. 34(f)), it is necessary that all of the approximately 9000 claims filed against the Yokohama Specie Bank, Ltd. be reviewed and a schedule issued showing the proposed payments before any payments can be made. Within sixty days after the issuance of the schedule, any aggrieved claimant may file in the District Court of the United States for the District of Columbia a complaint for review of such schedule, naming the Attorney General as defendant. If no complaint for review is filed, payments will be made in accordance with the schedule.

Far from suggesting that claimants might benefit by forbearing from suit, the Attorney General thus made plain that failure to sue would result in final payment at the post-war *yen* rate only. And he repeated the point in his letter accompanying the final schedule of claims, mailed in 1961 to all who had not formally cancelled their claims. The letter stated (R. 34): "If no such complaint for review is filed within the sixty-

day period, payments to claimants will be made by this Office as specified in the Final Schedule."

4. There is no substance, we believe, to the suggestion that the Attorney General concealed or failed clearly to inform petitioners of their right to seek judicial review. We stress that on three occasions the Attorney General took pains to inform petitioners—and their counsel—of the statutory provision for appeal of his determination. The first was the 1958 letter to petitioners and their counsel, quoted in the text above, which, as the court below noted, correctly outlined the substance of his decision and the remedies open to claimants under the statute (R. 77). Again, in dismissing petitioners' claims for failure to comply with his request to submit their original deposit certificates, the Attorney General included in the dismissal notice—mailed to claimants and their counsel—the specific information that "any further proceedings are governed by section 34(f) of the Trading with the Enemy Act" (R. 33)—the section that provides for judicial review. The Attorney General gave petitioners notice of their rights a third time when he mailed his "final schedule" of allowed claims and proposed payments. It was the mailing of that schedule in 1961 (as the letter itself stated) which actually triggered the running of the 60-day limitations period under Section 34(f). And in that letter he stated (R. 34):

> This Schedule is being served by registered mail on all claimants listed therein, as well as on claimants whose claims have been dismissed and disallowed. Pursuant to Section 34(f) of the Trading with the Enemy Act, as amended,

> any claimant considering himself aggrieved by this Final Schedule may, within sixty (60) days from the date of the mailing of the Schedule, file in the United States District Court for the District of Columbia a complaint for review of this Schedule, naming the Attorney General as defendant. * * * If no such complaint for review is filed within the sixty-day period, payments to claimants will be made by this Office as specified in the Final Schedule.

5. Petitioners may not be heard to answer that, while the Attorney General's repeated notifications of the judicial remedy provided by the Act may have been clear to individuals literate in the English language, many of the recipients of his communications—by reason of their foreign background and difficulty with the English language—were unable to understand them. Dispositive of this contention is the absence in this record of any claim that the named petitioners themselves—who at all times relevant here were advised by able counsel of their own selection, to whom copies of the Attorney General's communications were sent (*e.g.*, R. 9)—could not comprehend the Attorney General's letters.[13] This Court early held that an "estoppel *in pais* does not operate in favor of everybody. It operates only in favor of a person who has been misled to his injury, and he only can set it up." *Ketchum* v. *Duncan*, 96 U.S. 659, 666.

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[13] Not only did petitioners' counsel receive copies of the critical communications; for aught the record reveals, none of the named petitioners had any language difficulty at all. We point out that not one of the affidavits relied upon by petitioners was supplied by persons actually named in the complaint and therefore before this Court.

The Court, in that case, held that one aware of the true nature of a situation could not invoke the defense of estoppel although it might have been available to others not personally before the Court. Nor are petitioners helped by framing their suit as a "class" action. Clearly, they are not proper representatives of a class of claimants to which they—by virtue both of having been represented throughout by counsel and of never having shown that they themselves have any language problem—do not belong. F.R. Civ. P. 23(a). In addition, we point out that an individual with a language problem who receives an official communication from the government can readily obtain the assistance of others more familiar with the language.

6. Nor does an estoppel arise from the circumstance that the Attorney General requested claimants to submit their original *yen* certificates of deposit prior to payment on their claims. That request in no way prejudiced petitioners' ability to file timely suit under Section 34(f). The final schedule and the accompanying letter calling attention to the recipient's right to judicial review were mailed to everyone who had not formally withdrawn his claim—whether or not he had submitted a certificate and whether or not his claim had been allowed (R. 34). It is not suggested that those petitioners who did not file notices of cancellation (App., *infra*, pp. 44–45) did not receive the schedules. They were, therefore, in as good a position to file suit in 1961, when the schedules were mailed to them as they were in 1964, when they actually sued.

In addition, it was appropriate for the Attorney General to request the original *yen* deposit certificates—or, in lieu thereof, a notarized statement explaining why they could not be submitted and stating "that you have not received payments or renewed certificates" (R. 8)—before he honored debt claims based on the certificates. Payments on the certificates were being made elsewhere (Statement, *supra*, p. 11). It was therefore proper to assume that the absence of an original certificate was *prima facie* indication that the owner had received payment from another source.

The circumstances of this case are far removed from those in which courts have invoked equitable estoppel. Comparison with the facts of the *Glus* decision, on which petitioners principally rely, is illuminating. The defendant in that case was an employer whose agents had misled the plaintiff employee to believe that he had seven years in which to bring suit under the Federal Employers' Liability Act. The employer was held estopped to plead the Act's three-year statute of limitations. In the present case, the Attorney General clearly did not mislead petitioners with respect to the applicable time limitation for seeking judicial review of his disallowance of their debt claims. He made no misrepresentations. He advised them truthfully that he would allow their debt claims only at the post-war exchange ratio and that they would have to sue, within the time provided in the Act, to obtain a greater restitution. This was of course perfectly consistent with his subsequent action in settling at a higher exchange ratio with those debt claimants *who did sue*. Petitioners were not, by the government's conduct, "lulled into a

false security" (359 U.S. at 233). There was no offense "against equity and good conscience" (*id.* at 234).

B. In weighing the equities, it is also appropriate to consider the consequences if petitioners' untimely claims are allowed. To begin with, such a recovery would reduce the amount available in the War Claims Fund to pay victims of World War II.[14] Secondly, it would foster inequality of treatment among *yen* deposit certificate holders. Petitioners do not claim to represent all of those with unsatisfied *yen* deposit claims against the Japanese banks. The Sumitomo bank claimants (see Statement, *supra*, p. 14, n. 8) who filed timely suits against the Attorney General received but a small fraction of their claims, because of the inadequacy of the vested assets of that bank (see 228 F. Supp. at 708). The Sumitomo claimants who—like the present petitioners—failed to bring suit at all can get nothing, because the vested assets of that bank have been exhausted (50 U.S.C. App. 34(d)). Petitioners do not even represent the holders of all *yen* deposit claims against the Yokohama Specie Bank who have not been paid. There is another group, of at least 1,500 claimants, who formally withdrew their claims in response to the Attorney General's 1958 letter (Pet. Br. 7). If the remaining assets of Japanese banks are to be reopened for

[14] See 50 U.S.C. App. 39 (b)–(d), and War Claims Act of 1948, 50 U.S.C. App. 2001, 2007, 2012, 2012a. It is precisely because the government here is in a position akin to that of a stakeholder (though, of course, the moneys are those of the United States, not of a third party) of a fund against which there are competing claims that it felt it was not free to pay claims time-barred under the statute in order to settle this lawsuit.

further distribution, fairness would seem to require that the interests of these persons also be considered. Only Congress is in a position to adjust the equities of all concerned. For this reason we agree with the court below (R. 83) that "the relief sought * * * lies solely in legislative hands."

II

THE GOVERNMENT CANNOT BE ESTOPPED TO PLEAD THE STATUTE OF LIMITATIONS IN A SUIT UNDER THE TRADING WITH THE ENEMY ACT

We have shown that the circumstances of this case are not such as to give rise to an estoppel under the *Glus* principle. It is likewise plain that they are insufficient to bring the case within the related teachings of *Burnett* v. *New York Central R. Co.*, 380 U.S. 424.[15] We contend alternatively that the principle of

[15] In *Burnett* plaintiff's timely FELA suit in a State court was dismissed for improper venue after the limitations period expired—the State law not providing for transfer to the proper forum in these circumstances. Plaintiff then refiled the action in the district court eight days later. After noting that plaintiff "did not sleep on his rights" and that proper venue was not a jurisdictional prerequisite to the entertainment of the action in the State court, this Court held that the FELA statute of limitations was tolled for the period during which the timely State suit was pending. In the present case petitioners were two and one-half years late in commencing suit, notwithstanding that they had been given accurate advance notice by the Attorney General of their right to judicial review, the proper forum, the applicable limitation period, and, in the case of the named petitioners before the Court, were represented by counsel who was similarly notified. The considerations which compelled the Court's conclusion that Burnett's action was timely would indicate that the present suit was properly dismissed as untimely.

those cases is inapplicable to suits against the government under the Trading with the Enemy Act.

The position of the United States is not akin to that of private defendants: it may not be sued at all unless Congress consents. Consequently, "the terms of this consent to be sued in any court define the court's jurisdiction to entertain the suit" (*United States* v. *Sherwood*, 312 U.S. 584, 586); and if Congress prescribes a specific period in which suit against the government must be brought, that limitation is jurisdictional and "must be strictly observed" (*Soriano* v. *United States*, 352 U.S. 270, 276). Since the parties to a suit cannot waive jurisdictional limitations, government officials cannot enlarge the statutory time within which suit must be brought, even if by their conduct they may have misled the other party to the suit.[16] *E.g.*, *Munro* v. *United States*, 303 U.S. 36, 41; *United States* v. *Michel*, 282 U.S. 656; *Finn* v. *United States*, 123 U.S. 227; *Pittman* v. *United States*, 341 F. 2d 739 (C.A. 9), certiorari denied, 382 U.S. 941; *Legerlotz* v. *Rogers*, 266 F. 2d 457 (C.A.D.C.), certiorari dismissed, 362 U.S. 938; *Anderegg* v. *United States*, 171 F. 2d 127, 128 (C.A. 4), certiorari denied, 336 U.S. 967; *Wallace* v. *United States*, 142 F. 2d 240

[16] Compare the settled principle that "the United States is neither bound by nor estopped by the act of its officers or agents in entering into an arrangement or agreement to do or cause to be done what the law does not sanction or permit." *Utah Power & Light Co.* v. *United States*, 243 U.S. 389, 409, and cases cited; *Federal Crop Ins. Corp.* v. *Merrill*, 332 U.S. 380; *United States* v. *California*, 332 U.S. 19, 31, 40; *United States* v. *San Francisco*, 310 U.S. 16, 31-32; *Utah* v. *United States*, 284 U.S. 534, 545, 546.

(C.A. 2), certiorari denied, 323 U.S. 712; cf. *Automobile Club* v. *Commissioner*, 353 U.S. 180, 187.

This principle was firmly established when Congress enacted Section 34 of the Trading with the Enemy Act, which authorized suit against the government [17] but imposed a 60-day limitation upon its commencement. Congress presumably was aware that, save to the extent it authorized waiver or tolling of the limitations period in the Act, that period would be treated by the courts as jurisdictional [18]—and hence not to be enlarged by any conduct of the officials responsible for administering the Act. It provided no such exception to the time limitation; it granted no authority to the Attorney General or any other official to waive the limitation (see notes 16 and 18, *supra*). None, therefore, may be implied.[19] Accordingly,

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[17] It is not disputed that suits against the Attorney General under the Act, as successor to the Alien Property Custodian, are suits against the United States. *Banco Mexicano* v. *Deutsche Bank*, 263 U.S. 591, 602–603; *Codray* v. *Brownell*, 207 F. 2d 610 (C.A.D.C.), certiorari denied, 347 U.S. 903.

[18] See *Soriano* v. *United States*, 352 U.S. 270, 276; *Legerlotz* v. *Rogers*, 266 F. 2d 457 (C.A.D.C.), certiorari dismissed, 362 U.S. 938; *Brownell* v. *Nakashima*, 243 F. 2d 787, 792 (C.A. 9), certiorari denied, 355 U.S. 872; *Cisatlantic Corporation* v. *Brownell*, 131 F. Supp. 406, 407 (S.D.N.Y.), affirmed, 222 F. 2d 957 (C.A. 2). Thus, where Congress has desired to permit officials to waive statutes of limitations, it has done so expressly. See, *e.g.*, 26 U.S.C. 6532(a)(2).

[19] The principle that, in suits against the United States, the statute of limitations will not be tolled by implication was emphatically reaffirmed in *Soriano* v. *United States*, 352 U.S. 270. In that case, petitioner's suit against the United States under the Tucker Act was not brought within the period of limitations prescribed by the Act. Soriano asserted that he was precluded from bringing suit because of wartime hostilities.

since petitioners' suit was untimely under the Act (see p. 19, *supra*),[20] the court was without jurisdiction to grant relief.

Nor need we rest with an inference from legislative silence—plain as that inference is in the circumstances. Congress made its intention that the limitations period in the Trading with the Enemy Act was to be strictly observed unmistakable, by expressly providing in Section 34(i):

For this reason he contended, as petitioners do here, that the circumstances required the limitations period to be tolled even though Congress had not provided for such tolling. This Court held—in a decision which applies with equal force to petitioner's contentions in this alien-property litigation—that the Tucker Act limitations period prescribed by Congress could not be tolled by implication (352 U.S. at 275–276; emphasis added):

> To permit the application of the doctrine urged by petitioner would impose the tolling of the statute in every time-limit-consent Act passed by the Congress. For example, statutes permitting suits for tax refunds, tort actions, *alien property litigation*, patent cases, and other claims against the Government would all be affected. Strangely enough, Congress would be required to provide expressly in each statute that the period of limitation was not to be extended by war. But Congress was entitled to assume that the limitation period it prescribed meant just that period and no more. With this intent in mind, Congress has passed specific legislation each time it has seen fit to toll such statutes of limitations because of war. And this Court has long decided that limitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied. * * *

A similar issue—whether the statute of limitations in the Tucker Act is tolled by certain administrative proceedings—is involved in *Crown Coat Front Co., Inc.* v. *United States*, pending on writ of certiorari, No. 371, this Term. See Br. for United States, pp. 22–35; see, also, pp. 35–36, n. 26, *infra*.

[20] It was conceded at the outset of this litigation that petitioners were not within the class of claimants on whose behalf timely suits were filed (R. 3).

> The sole relief and remedy available to any person seeking satisfaction of a debt claim out of any property or interest which shall have been vested in or transferred to the Alien Property Custodian * * * or the proceeds thereof, shall be the relief and remedy provided in this section, and suits for the satisfaction of debt claims shall not be instituted, prosecuted, or further maintained except in conformity with this section * * *.

This provision gains added significance when it is noted that the Act provides for the tolling of limitations in specified circumstances[21] that are concededly not applicable here. The language of Section 34(i) quoted above indicates that these provisions were intended to be exclusive.

We derive additional support from the legislative history. The committee reports of both Houses stress that the reason for prescribing specific time limits in Section 34 was that 'litigation with respect to alien property matters should be brought to a close and the Government should not for all time be open to attack."[22] Indeed, with this in mind, the time for filing debt claims with the Custodian was deliberately re-

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[21] Section 34(a) of the Trading with the Enemy Act gives the Attorney General any defense to the payment of a debt claim that would have been available to the debtor himself, "except that the period from and after the beginning of the war shall not be included for the purpose of determining the application of any statute of limitations." 50 U.S.C. App. 34(a). Section 33 tolls the limitation for filing suit for the return of vested property during the pendency of certain other proceedings. 50 U.S.C. App. 33.

[22] S. Rep. No. 1839, 79th Cong., 2d Sess., p. 3; H. Rep. No. 2398, 79th Cong., 2d Sess., p. 9.

duced to two years from the four-year period originally proposed.[23] Nor did the adequacy of the period for seeking judicial review of the Custodian's rulings on such claims escape congressional notice. The initial bill would have allowed only 45 days to institute court proceedings.[24] When it was urged at the House committee hearings on the bill that three months would be a more reasonable limit,[25] Congress rejected the suggestion and enacted the present 60-day period. There is accordingly no support in the hearings or committee reports for petitioners' contention that it would further Congress' purposes to authorize their suits to be filed two and one-half years beyond Congress' deliberately chosen deadline.

The decisions cited by petitioners are manifestly inapposite. *Glus* and *Burnett*—on which petitioners principally rely—were not even suits against the government.[7] Therefore in neither did the Court have occasion to consider the jurisdictional considerations which preclude the invocation of estoppel in such suits. We point out that in *Soriano* v. *United States*, 352 U.S. 270 (*supra*, p. 31, n. 19), the Court had expressly rejected as precedent a decision holding that the statute of limitations was tolled in a suit against a private party, stating: "That case involved private citizens, not the Government. It has no applicability to claims against the sovereign." 352 U.S. at 275.

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[23] See Hearings before Subcommittee No. 1 of the Committee on the Judiciary of the House of Representatives on H.R. 5089, 79th Cong., 2d Sess., p. 45.

[24] *Id.*, pp. 46–47.

[25] *Id.*, pp. 78–79.

This precept applies squarely to *Glus* and *Burnett*. The other cases relied on by petitioners (Br. 27–28) are likewise wide of the mark.[26] The only pertinent decision under the Trading with the Enemy Act holds that a claim of equitable estoppel is unavailable.

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[26] *N.V. Philips, etc.* v. *Atomic Energy Commission*, 316 F. 2d 401 (C.A.D.C.), held only that the general limitation period in 28 U.S.C. 2401(a) for commencing civil actions against the United States in court did not govern the time within which an administrative claim for compensation had to be presented to the AEC. Similarly, *McWilliams* v. *United States*, 138 F. Supp. 863 (Ct. Cl.), dealt only with the time a cause of action against the government accrued; it discussed neither estoppel nor tolling. The question presented in *Borg-Warner Corp.* v. *United States*, 39–1 U.S.T.C. (CCH), ¶ 9292 (N.D. Ill.), affirmed, 108 F. 2d 424 (C.A. 7), was only "when does the limitation period begin to run?" (108 F. 2d at 426). *Exchange & Savings Bank of Berlin* v. *United States*, 226 F. Supp. 56 (D. Md.), and *Vestal* v. *Commissioner*, 152 F. 2d 132 (C.A. D.C.), deal with the situation—not present in the instant case—where Congress did expressly authorize the responsible official to waive statutes of limitations; and in light of *Automobile Club* v. *Commissioner*, 353 U.S. 180, 187 (see pp. 29–30, *supra*), those decisions are of doubtful authority.

The holding in *Northern Metal Co.* v. *United States*, 350 F. 2d 833 (C.A. 3), that the time in which to commence suit against the United States under the Tucker Act is tolled by the pendency of required administrative proceedings, is inconsistent with this Court's decision in *Soriano* v. *United States*, 352 U.S. 270, and the Second Circuit's decisions in *States Marine Corp. of Delaware* v. *United States*, 283 F. 2d 776, and *Crown Coat Front Co., Inc.* v. *United States*, 363 F. 2d 407, pending on writ of certiorari, No. 371, this Term. For the reasons stated in our brief in *Crown Coat Front*, we think that *Northern Metal Co.* was incorrectly decided. In any event, that case is of no assistance to petitioners here. All administrative proceedings in the instant case were completed before the statute of limitations in 50 U.S.C. App. 34(f) commenced to run.

Osbourne v. *United States*, 164 F. 2d 767 (C.A. 2), involved an action by a seaman for negligence under the Jones Act

Legerlotz v. *Rogers*, 266 F. 2d 457 (C.A. D.C.), certiorari dismissed, 362 U.S. 938.[27]

III

THE FIFTH AMENDMENT DOES NOT PRECLUDE APPLICATION OF THE STATUTE OF LIMITATIONS TO THE CIRCUMSTANCES OF THIS CASE

Petitioners assume that the Custodian's vesting of the Yokohama Specie Bank's assets as enemy property also constituted a taking of the property of the holders of the bank's *yen* certificates of deposit. They reason from this premise that such summary seizure violates

against his employer, American President Lines, and the United States, the owner of the ship. Without ruling as to whether the Suits in Admiralty Act or the Jones Act period of limitations was applicable, the Second Circuit held that the period of limitations was tolled by the seaman's imprisonment by the Japanese during World War II. In so doing, it ruled that the doctrine of *Hanger* v. *Abbott*, 73 U.S. 532, was controlling. 164 F. 2d at 768, 769. Insofar as the 1947 decision in *Osbourne* holds statutes of limitation for suits against the United States tolled by war, it is inconsistent with, and overruled by, *Soriano* v. *United States*, 352 U.S. 270, in which this Court expressly ruled that the doctrine of *Hanger* v. *Abbott* "has no applicability to claims against the sovereign." 352 U.S. at 275. And apparently for that reason this Court in *Burnett* v. *New York Central R. Co.*, 380 U.S. 424, cited *Osbourne* only for the proposition that "the FELA limitation provision" may be tolled by war (380 U.S. at 427, 429).

[27] Petitioners' contention (Br. 36–38) that timely suit by other claimants was in itself enough to toll the running of the statute of limitations in favor of all others who had similar claims against respondent but did not assert their rights is plainly unsound. Those who fail to seek timely review of adverse decisions derive no benefit from the successful appeals of those who do. *Sunal* v. *Large*, 332 U.S. 174; *Ackermann* v. *United States*, 340 U.S. 193; *Annat* v. *Beard*, 277 F. 2d 554 (C.A. 5), certiorari denied, 364 U.S. 908.

their Fifth Amendment rights to due process unless a fair opportunity for judicial review is subsequently provided, and that the 60-day period prescribed by Congress in which to seek review of the Attorney General's actions on debt claims is not adequate for that purpose. We disagree.

To begin with, the argument rests on a mistaken premise. The Custodian never seized or took petitioners' property. As holders of the Yokohama Specie Bank's *yen* certificates of deposits, petitioners' relationship with the bank was simply that of creditor and debtor. As this Court has stated, "an unsecured simple contract creditor has, in the absence of statute, no substantive right, legal or equitable, in or to the property of his debtor." *Pusey & Jones Co.* v. *Hanssen*, 261 U.S. 491, 497. Thus, in vesting the Yokohama Specie Bank's American assets as enemy property the Custodian did not seize any legal or equitable interest of the bank's creditors, and Congress was not required to make those vested assets available for relief of the contract claims against their former owners. *Sutherland* v. *Norris*, 24 F. 2d 414 (C.A. 3); *Kogler* v. *Miller*, 288 Fed. 806, 808 (C.A. 3).

At all events, petitioners had an adequate and fair opportunity to enforce their claims against the vested assets.[28] Each was warned by letters from the Attorney General in 1959 of the substance of his administrative determination (R. 6, 29). As noted earlier,

[28] We note, also, that Congress left open another avenue of relief. Section 34(i) of the Trading with the Enemy Act provides:

> Nothing contained in this section shall bar any person from the prosecution of any suit at law or in equity

these letters also advised petitioners of their right to judicial review and of the forum and time within which the Act required that such review be sought. They thus had had nearly two years in which to decide upon a course of action when, in 1961, respondent's final schedule was mailed and the 60-day limitation period commenced to run as prescribed in Section 34(f)."

Moreover, this Court has upheld—over similar objections based on due process grounds—the constitutionality of statutes limiting to 60 days the period within which to challenge an administrative decision. The leading case is *Yakus* v. *United States*, 321 U.S. 414. The Emergency Price Control Act of 1942 (56 Stat. 23, as amended by 56 Stat. 765) authorized the Price Administrator to set maximum commodity prices by regulation. Persons affected could challenge a regulation only by protest to the Price Administrator filed within 60 days after it was promulgated. The Act also provided criminal penalties for failure to comply with the price regulations. Yakus was convicted of violating the Act by selling beef above the prices set by the Administrator's regulations. He challenged that conviction on the ground, *inter alia*, that 60 days was not sufficient time within which

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against the original debtor or against any other person who may be liable for payment of any debt for which a claim might have been filed hereunder. [50 U.S.C. App. 34(i).]

The right of the creditors here (petitioners) to proceed against the original debtor is not an empty one. The successor of the debtor Yokohama Specie Bank is still solvent and in business.

"The adequacy of this notice is discussed in Point I of our argument, *supra*, at pp. 24–26.

to protest the administrative decision and that his conviction for failing to comply with the ceiling prices in such circumstances was therefore a denial of due process. The Court rejected that constitutional argument, noting "numerous instances" of comparable or shorter periods within which to challenge administrative regulations that had been sustained by the Court. See 321 U.S. at 435, and cases there cited. Since 60 days is a constitutionally adequate time to seek review of an administrative order in the context of a criminal conviction, we submit that the identical period prescribed in Section 34 for seeking review of the Attorney General's debt claim determination is, *a fortiori*, constitutionally adequate.

We emphasize that there is nothing unusual in the length of time for review prescribed in Section 34(f). A 60-day period is the usual time allowed by Congress for an appeal to the courts from the ruling of a federal administrative agency—and Section 34(f) itself provides that judicial review of the Attorney General's debt claim determinations shall be on the administrative record made before him.[30] *Reissner* v. *Rogers*, 276 F. 2d 506, 509 (C.A.D.C.), certiorari denied, 364 U.S. 816; *International Silk Guild* v. *Rogers*, 262 F. 2d 219, 224, n. 7 (C.A.D.C.). A 60-day period for filing a petition or complaint for review is prescribed by the Judicial Review Act of 1950, 5 U.S.C. 1031, 1034, with respect to the Federal Com-

[30] Section 34(f) gives the district court discretion to take additional evidence, but only "upon a showing that such evidence was offered to and excluded by the Custodian or could not reasonably have been adduced before him or was not available to him."

munications Commission, the Federal Maritime Administration, and certain orders of the Secretary of Agriculture. Similarly, petitions for review of orders of the Federal Trade Commission (15 U.S.C. 45(c)), the Securities and Exchange Commission (15 U.S.C. 78y), the Civil Aeronautics Board (49 U.S.C. 1486), the Federal Power Commission (16 U.S.C. 825*l*(b)), and the Secretary of Health, Education and Welfare under the Social Security Act (42 U.S.C. 405(g)), must be brought within 60 days of the final administrative action.[21] Sixty days is also the time in which to appeal to a court of appeals in a case in which the United States or an officer or agency is a party. F.R. Civ. P. 73(a). Congress did not act unfairly in applying this common rule to suits under the Trading with the Enemy Act.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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Solicitor General.

BAREFOOT SANDERS,
Assistant Attorney General.

RICHARD A. POSNER,
Assistant to the Solicitor General.

DAVID L. ROSE,
RICHARD S. SALZMAN,
Attorneys.

JANUARY 1967.

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[21] See, also, 7 U.S.C. 608c(15)(B), limiting to twenty days the time within which to seek review of certain marketing orders promulgated by the Secretary of Agriculture.

APPENDIX

Retainer Agreement

I, hereby retain and employ A. L. Wirin and Fred Okrand, 257 South Spring Street, Los Angeles, California, and Marshall Ross, 510 South Spring Street, Los Angeles, California, and any other attorney or firm of attorneys they may associate in this matter to represent me in the matter of my claim as a depositor in the Yokohama Specie Bank, Ltd. based on Certificate No(s). 68729 issued by said bank. As a depositor receiving said certificate(s) known as a "Yen Certificate(s)" I have heretofore filed a claim with Department of Justice, Office of Alien Property, Washington, D.C., seeking payment of this debt to me out of properties formerly belonging to the above named bank and now vested in the United States Government.

I herewith empower and authorize said attorneys to do any and all things they may deem necessary to secure recovery for me of my claim. I agree to pay said attorneys for their services, an amount equal to ten (10%) per cent of the total recovery on my behalf, out of any moneys they may recover for me in this matter.

Dated this 19th day of October 1955.

[S] Ayako Honda,
Residing at 1576 Valota Rd.,
Redwood City, Calif.

[Similar form agreements retaining Messrs. Wirin and Okrand were filed with the Office of Alien Prop-

erty by each of the other named petitioners on the date noted:

Kanekichi Murakami	October 19, 1955
Kaneyo Sato	October 24, 1955
Tomi Tsugi	October 18, 1955
Geusuke Yoshida	October 19, 1955.]

[Source: Administrative record.]

Claim No. 52200

[Registered mail]

MAY 12, 1959.

AYAKO HONDA,
1576 Volota Road,
Redwood City, California.

Dear Sir: Enclosed is a copy of my Order dismissing the above-numbered debt claim.

Very truly yours,

[Signed] Paul V. Myron,
Deputy Director,
Office of Alien Property.

Enclosure
cc: Wirin, Rissman & Okrand
257 South Spring Street
Los Angeles 12, California

[Source: Record in the court of appeals. Similar letters, with copies to counsel, appear in the files of the other named petitioners.]

NOTICE OF CANCELLATION OF CLAIM

Claim No. 48000 [Post marked September 29, 1959]
Claimant Kaneyo Sato
Debtor: Yokohama Specie Bank, Ltd.

I hereby cancel the above claim filed with the Office of Alien Property, without prejudice to any rights which I may have to collect the funds in Japan.

[s] Kaneyo Sato, (*Claimant*).

[Source: Record in the court of appeals.]

Notice of Cancellation of Claim

Date, December 1, 1958.

Claim No. 17796
Claimant Gensuke Yoshida
Debtor Yokohama Specie Bank, Ltd.
(I hereby cancel the above claim.)

[s] Gensuke Yoshida.

[Source: Record in the court of appeals.]

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